TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 872.

R. SARLLS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JANUARY 3, 1893.

(15,237.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1893.

a In the District Court of the United States for the Western District of Arkansas.

Pleas and proceedings before the Hon Isaac. C. Parker, United States district judge for the western district of Arkansas, in the case of—

UNITED STATES } Indicted for Intro. Lager Beer
vs. into the Indian Country.
R. SARLLS. }

1 UNITED STATES OF AMERICA, }
Western District of Arkansas, }

In the District Court, May Term, A. D. 1892.

UNITED STATES } Introducing Spirituous Liquors
versus into the Indian Country.
R. SARLES. }

The grand jurors of the United States of America duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas upon their oath present that heretofore, to wit, on the 1st day of March, A. D. 1892, at the Choctaw nation, in the Indian country, in the western district of Arkansas aforesaid, one R. Sarles then and there did unlawfully introduce into the Indian country, in said district, spirituous liquors, to wit, ten gallons of lager beer, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

WM. H. H. CLAYTON,
U. S. District Attorney, Western District of Arkansas.

(Endorsed on back:) No. 2311. United States *versus* R. Sarles. Int., etc. A true bill. J. M. Lively, foreman. Witnesses: Jno. Abbott, G. E. Cole, C. H. Yandell, Harry Ellard, Wm. Hassen, W. J. Wilson, J. H. Boling. Filed July 15, 1892. S. Wheeler, clerk.

2 In the District Court of the United States for the Western District of Arkansas, August Term, 1892.

MONDAY MORNING, 8½ O'CLOCK, *Oct.* 17, 1892.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES } Indictment for Intro. Lager Beer. No. 2311.
vs.
R. SARLES. }

On this day come the United States of America, by Wm. H. H. Clayton, Esq., attorney for the western district of Arkansas, and

come the said defendant, in custody of the marshal and by his attorney, Wm. M. Cravens, Esq., and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country. Whereupon, on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined. Whereupon the following were selected for the trial of this cause, to wit: David Thompson, Howard A. Folk, Ben. Williams, Sam. Bostic, G. W. Duckworth, Jesse Howell, Robert Spoon, James Chaise, Joseph Bonnier, A. J. Roberts, L. B. Barry, Albert Hoag, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing the evidence and receiving the charge of the court retired to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty as charged in the within indictment.

"(Signed) A. J. ROBERTS, *Foreman.*"

3 Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

TUESDAY, *Oct.* 18, 1892.

(Caption omitted.)

On this day come the said defendant by his attorney, and files his motion to set aside the verdict of the jury and for a new trial in this cause. Said motion coming on to be heard and the court, being well and sufficiently advised in the premises, doth overrule said motion.

4 In the District Court of the U. S. for the Western District of Arkansas, Aug. Term, 1892.

TUESDAY MORNING, 8½ O'CLOCK, *Oct.* 18, A. D. 1892.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *to use* R. SARLS.	No. 2341. Indictment for Intro. Lager Beer in the Indian Country.

On motion of Wm. H. H. Clayton, Esq. attorney for the western district of Arkansas, the said defendant, R. Sarles, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned

against him by the jury in this cause on the 17 day of October, A. D. 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said R. Sarles, for his misdemeanor aforesaid, be imprisoned in the United States jail situated at Fort Smith, in the western district of Arkansas, for the term and period of three (3) months, and that he pay to the United States of America a fine of two hundred & fifty ($250) dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered that the marshal of the western district of Arkansas, to whose custody the said R. Sarles is now here committed, is hereby required to receive and safely keep and convey the body of the said R. Sarles hence to said United States jail, without delay, and deliver him to the custody of the keeper of said jail, who is hereby required to receive and safely keep the said R. Sarles in jail in execution of the sentence aforesaid and in conformity with the same for the full period of time aforesaid; and it is further ordered that the clerk of this court is hereby required to furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said jail and the other returned by the marshal to this court, with a full and true account of the execution of the same.

I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above-entitled cause as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this — day of ——, A. D. 189–.

—— ——, *Clerk.*

By —— ——, *Deputy Clerk.*

Received at the United States jail at Fort Smith, Arkansas, this — day of ——, A. D. 189–, from —— ——, marshal of the United States for the western district of Arkansas, the body of the within-named —— ——, together with a copy of this writ.

—— ——.

I certify that I served the within writ by delivering the body of the within-named —— ——, together with a copy of this writ, into the custody and hands of the United States jailer at Fort Smith, in the State of Arkansas, on the — day of ——, 189–, and have his receipt therefor endorsed thereon, as within I am commanded.

—— ——,

United States Marshal for Western District of Arkansas.

[Endorsed:] United States *versus* —— ——. Mittimus.

5 FRIDAY, *Nov. 4th*, 1892.

(Caption omitted.)

Comes defendant and tenders his bill of exceptions and asks that the same be signed and made a part of the record in the above-entitled case, which is accordingly done.

Defendant also files his assignment of errors and his petition for writ of error to the Supreme Court of the United States.

6 *Bill of Exceptions.*

In the United States District Court for the Western District of Arkansas.

UNITED STATES } Introducing Lager Beer in the Indian Country.
vs.
R. SARLLS. }

Be it remembered that on the trial of the above-entitled cause the plaintiff, to maintain the issues on its part, introduced H. J. ELLARD, who, being duly sworn, testified as follows:

Direct examination by Mr. MELLETTE, ass't district attorney:

Q. What is your name?
A. H. J. Ellard.
Q. Do you know Mr. Sarlls, the defendant?
A. Yes, sir.
Q. He is charged with introducing lager beer in the Indian country; I wish you would state to the jury all you know about it.

Objection by Col. Cravens, counsel for defendant, Sarlls, because lager beer is not a spirituous liquor and the introduction of it in the Indian country is not prohibited by the statute.

Objection overruled by the court, and the defendant, by his counsel, excepted, to the ruling of the court.

Q. You and Mr. Sarlls were in partnership selling beer, were you not?
A. Yes, sir.
Q. Where did you live?
A. At McAlester.
Q. Did you both live there?
A. He lived at South McAlester and I at North McAlester.
Q. Well, you were in partnership?
A. Yes, sir.
Q. How much beer was brought in the Indian country under that partnership?
A. About six car-loads.
Q. Where did it come from?
A. St. Louis.
Q. What brand of beer was it?
A. Lemp's; first we got Lemp's pale and after that the dark brand.
Q. Did it come in barrels or in kegs?

A. In bottles and barrels.
Q. Who ordered the beer?
A. Mr. Sarlls ordered the first car-load.
7 Q. Who ordered the next?
A. I did, but by his instructions.
Q. Where did you put the beer?
A. There was some of it stored in a vacant house near my place, and some was stored in North McAlester.
Q. Did you have a written partnership?
A. Yes, sir.
Q. I wish you would let me have it.

Objected to by Col. Cravens, counsel for defendant, because lager beer is not a spirituous liquor, and the introduction of it in the Indian country is not prohibited by the statute.

Objection overruled by the court, and the defendant, by his counsel, excepted to the ruling of the court.

By Mr. MELLETTE:

Q. The business was carried on in your name, was it not?
A. Yes, sir.
Q. Did you pay any proceeds?
A. Yes, sir.
Q. How much?
A. $400. That was only a part of the expenses. We did not have a final settlement, but I paid him $400.
Q. Was you arrested?
A. Yes, sir; I was arrested and paid a fine.
Q. How much?
A. $75.
Q. You have gotten rid of your part, then?
A. I hope so.
Q. And you paid Mr. Sarlls $400?
A. Yes, but had no final settlement.
Q. Where did you order your beer from?
A. From St. Louis.
Q. Who had it unloaded?
A. I was attending to that business, but got a livery team to unload the beer.
Q. What train?
A. The M., K. & T.
Q. From the north?
A. Yes, sir.
Q. Six car-loads?
A. Yes, sir.
Q. When was that?
A. The first car-load was received on the 8th day of last March.
Q. When the last car?
A. That was on the 3rd or 5th of June; I am not positive which.
Q. How did you dispose of the beer?

Objected to by Col. Cravens, counsel for defendant, Sarlls, because defendant is not charged with selling beer.

Objection overruled by the court, and the defendant, by his counsel, excepted to the ruling of the court.

By Mr. MELLETTE:

Q. What became of the beer that was introduced?

8 A. We sold it and drank some of it.

Q. Drank it?

A. Yes, sir; I drank a good deal.

Q. You sold it as a beverage there?

A. Yes, sir.

Cross-examination.

By Col. CRAVENS, counsel for defendant:

Q. You had a license and paid tax to the Government for the privilege of selling beer?

A. Yes, sir.

By the COURT:

Q. Where was your place?

A. In south McAlester.

By Mr. MELLETTE:

Q. Which side of the track did you unload?

A. On the west side.

Q. Where did your sell the beer?

A. To any customer we could.

Q. Where?

A. Some at Krebs, South McAlester, South Canadian, Savanna, and Shetoka and Hartshorne.

Q. You sold that by instructions of Mr. Sarlls?

A. Yes, sir.

By Col. CRAVENS:

Q. You simply sold it at your place and delivered it at Krebs, South McAlester, and the other places?

A. Yes, sir; also some at Alderson.

Q. You had a wholesale and retail dealer's license?

A. Yes, sir.

Q. And paid tax?

A. Yes, sir.

Q. This was ordinary lager beer?

A. Yes, sir.

Q. And you sold it as nothing else?

A. Yes, sir.

Q. No whi-key in it?

A. No, sir.

Q. Was that malt liquor?

A. Yes, sir.

Q. And you sold it?
A. Yes, sir.
Q. Where is your place of business?
A. On the west side of the track, in North McAlester.
Q. You had some stored in South McAlester?
A. Yes, sir.
Q. Where was that store?
A. On the west side of the track.
Q. South McAlester is on the same side of the track that Old McAlester is?
A. Yes, sir.
Q. Your place of business was on the west side of the track and your beer was sold there?
A. Yes, sir.
A. And by that you mean the Missouri, Kansas & Texas?
A. Yes, sir.

By the COURT:

Q. This is the ordinary lager beer?
A. Yes, sir.
Q. Is it intoxicating?
A. Yes, sir.

The plaintiff next introduced W. J. WILSON, who, being duly sworn, testified as follows:

9 Direct examination.

By Mr. MELLETTE:

Q. What is your name?
A. W. J. Wilson.
Q. Where do you live?
A. South McAlester.
Q. Do you know Mr. Sarlls, the defendant?
A. Yes, sir.
Q. He is charged with introducing lager beer in the Indian country. I wish you would state what you know about his having liquor.

By Col. CRAVENS, counsel for defendant: I make the same objection as before, on the ground that lager beer is not a spirituous liquor, and the introduction of it in the Indian country is not prohibited by the statute.

Objection overruled by the court, and the defendant, by his counsel, excepted to the ruling of the court.

By Mr. MELLETTE:

Q. Just state what you know.
A. All I know is that I bought beer from Mr. Sarlls.
Q. How much did you buy?
A. Thirty-five barrels.
Q. Was it delivered to your place?

A. It was delivered to the Choctaw depot.
Q. At South Town?
A. Yes, sir; at South McAlester.
Q. How did you happen to buy from Mr. Sarlls?
A. He solicited my trade.
Q. And thirty-five barrels were delivered at the depot on the track? What railroad?
A. The Choctaw.
Q. What side of the M., K. & T.?
A. This side.
Q. East side?
A. Yes, sir.
Q. What brand?
A. W. J. Lemp's.
Q. What was it in?
A. In bottles.
Q. Who did you pay for that beer?
A. Mr. Sarlls.
Q. When was that—this last July?
A. Yes, sir.

By the COURT:

Q. Where did he get it, do you know?
A. I don't know.
Q. Do you know where it is made?
A. I believe it is made in St. Louis.

Cross-examination.

By Col. CRAVENS, counsel for defendant:

Q. What kind of beer did you say it was?
A. W. J. Lemp's.
Q. I thought you said Anheuser?
A. No; Lemp's.
Q. Lager beer?
A. Yes, sir.
Q. Was your trade directly with Mr. Sarlls?
A. Yes, sir.
Q. And you paid him the money?
A. Yes, sir.
Q. That was malt liquor?
A. Yes, sir.

By the COURT: Does it make one drunk or intoxicated?
A. Well, it never made me drunk.
Q. What is your knowledge of beer as to producing intoxication?
A. I don't know. I have not seen anybody under the influence of it.
Q. Well, if they would drink enough of it would it intoxicate them?
A. I don't know; it didn't intoxicate me.

Q. It did not intoxicate you not because it is lager beer but because you did not drink enough of it?
A. I guess that is right.
Q. You have seen drunken men around there?
A. Yes, sir.

WILLIAM HASSON was then introduced by plaintiff, and, being duly sworn, testified as follows:

Direct examination.

By Mr. MELLETTE:

Q. What is your name?
A. William Hassos.
Q. Do you know Mr. Sarlls?
A. Yes, sir.
Q. Where do you live?
A. South McAlester.
Q. He is charged with introducing lager beer in the Indian country; what do you know about that?
A. My experience in the beer business was very short; I only sold two days for them.
Q. Did you sell the beer?
A. I took orders for Mr. Sarlls.
Q. What did he send you to Alderson for?
A. To take orders for beer.
Q. Explain how it was.
A. I went there and took some orders and sent them to Mr. Sarlls.
Q. How did you happen to come down there?
A. Alderson?
Q. Yes, sir.
A. He sent me down there.
Q. You took orders for Mr. Sarlls?
A. Yes, sir.
Q. Was the beer sent?
A. I think it was.
Q. What kind of beer was that?
A. Lemp's beer.

By Col. CRAVENS, counsel for defendant:

Q. There was no liquor in it, but was simply nothing but malt liquor?
A. I think so.

Col. CRAVENS: I ask the court to exclude his testimony in the case which relates — lager beer and malt liquor, because lager beer is not a spirituous liquor and the introduction of it in the Indian country is not prohibited by the statute.

Motion to exclude overruled by court, and defendant excepted.

By the COURT:

Q. That would produce intoxication?
—. I never drank enough to get drunk.
Q. Would it produce intoxication?
A. I never drank enough to get drunk.
Q. Would it produce intoxication if you would drink enough of it?
A. I think so.
—. Haven't you seen drunken men around there?
A. Yes, sir.
Q. Often?
A. I can't say as to the number of times; I have seen men there drunk, though.

The plaintiff then introduced JAMES BOLLING, who, being duly sworn, testified as follows:

Direct examination.

By Mr. MELLETTE:

Q. J. H. Boling is your name?
A. Yes, sir.
Q. Where do you live?
A. At Hartshorne.
Q. What nation?
A. Choctaw nation.
Q. Do you know Mr. Sarlls?
A. Yes, sir.
Q. He is charged with selling beer in the Indian country; what do you know about that?
A. He came over to Hartshorne, and I was talking with him and made some arrangements to get beer from him.
Q. How much beer did you get?
A. I think it was forty-five barrels or forty-one; I don't remember which.
Q. Did you use all that?
A. I didn't sell all of it; I think I sent fourteen barrels back.
Q. Is that all the beer transaction you had with Mr. Sarlls?
A. Yes, sir.
Q. Had none further with Mr. Ellard?
A. I think I got two barrels from Mr. Ellard—no; it was five barrels I got from him.
Q. Those from Mr. Sarlls—where were they delivered?
A. At the depot.
Q. At Hartshorne?
A. Yes, sir.
Q. Did it make a car-load?
A. No; about half a car-load.
Q. What kind was it?
A. Lemp's; it was labeled malt tonic.
Q. What was the five barrels you got from Ellard?

A. That was malt tonic.
Q. When was that?
A. In April, I think.
Q. When did you stop selling?
A. About the 20th of March.

12 Cross-examination.

By Col. CRAVENS:

Q. Did you have a license from the Government?
A. Yes, sir.
Q. For what?
A. To sell beer.
Q. Or malt liquor?
A. Yes, sir.
Q. And you bought it from Sarlls and Ellard simply as lager beer?
A. Yes, sir; and it said malt tonic.
Q. Well, it was simply lager beer?
A. I suppose so.

The defendant, by his counsel, moved the court to exclude the testimony of H. J. Boling in reference to the introduction and sale of lager beer, because it is not prohibited by the statute, and his motion being overruled by the court the defendant at the time excepted.

By Mr. MELLETTE:

Q. Hartshorne is on the Choctaw road?
A. Yes, sir.
By the COURT: This beer intoxicates, don't it?
A. I couldn't say. I didn't drink enough of it.
Q. You saw other people that were drunk there?
A. Yes, sir.
Q. Where beer was sold?
A. Yes; but of course I couldn't tell whether — got drunk on beer.
Q. As there is no whiskey sold about there they must have gotten drunk on beer?
A. I suppose so.

This was all the testimony in the case, and thereupon the defendant moved the court to instruct the jury as follows:

"That lager beer or malt liquor is not included in the term spirituous liquor or ardent spirits and the introduction of it into the Indian country is not prohibited by section 2139 of the Revised Statutes of the United States, and they should acquit the defendant if they find he only introduced lager beer or malt liquor."

Which instruction the court refused to give to the jury,
13 and to such refusal to so instruct the jury the defendant at the time excepted; and thereupon the court instructed the jury as follows:

11 GENTLEMEN OF THE JURY: You have heard the evidence in this case—the case of The United States *vs.* Ratus Sarles. It now becomes the duty of the court to give you the law bearing upon this case, but before doing so we will ascertain the nature of the proposition that is necessary to be established here before you can find the defendant guilty; then you are reminded in this connection that this proposition must be established to a degree of certainty defined by the law as a state of case proved beyond a reasonable doubt. To find the nature of the proposition we go to the indictment found by the grand jury in this case. This indictment charges that the defendant, on the first day of March, 1892, at the Choctaw nation, in the Indian country, in the western district of Arkansas, did unlawfully introduce into the Indian country, in said district, spirituous liquors, to wit, 10 gallons of lager beer. The date laid in the indictment need not be strictly proven as laid. As far as time is concerned it is sufficient if the proof shows that the act done which is charged as a crime was done at any time within three years prior to the fifteenth day of July, 1892, the day upon which the indictment was found by the grand jury. In regard to the amount of lager beer introduced, if the proof shows the introduction of lager beer to any amount that would be responsive to the allegation of quantity.

This indictment was drawn under section 2139 of the General Statutes of the United States, which provides first, "That no ardent spirits shall be introduced under any pretense into the Indian country" * * * "That every person who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wines to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous
15 liquors or wine into the Indian country, shall be punishable by imprisonment," etc.

This statute in its present form was enacted on the 9th day of July, 1832, 60 years ago, though there has been a statute upon this subject substantially of the same character since 1802. It is necessary that I should tell you how this offense may be committed—that is, what acts the defendant must be shown by the evidence to have done before you can find him guilty of violating this statute. The offense of introducing spirituous liquors into the Indian country may be committed by a party actually and really with his own hands taking spirituous liquors from some point outside of the Indian country to some point inside of it. If the liquor so taken in by him is spirituous liquor it comes within the prohibition of the statute, and he who thus takes it in introduces it into the Indian country, and by such an act subjects himself to the penalty prescribed by the statute. But he may introduce it in contemplation of the law without actually and really with his own hand taking it from some point outside of the Indian country to some point inside of it. If he remains on the inside of the Indian country and sends an order outside for it and it is sent in to him on his order, he by this act indirectly commits the crime of introduction prohibited by the statute. This is a state of case where the man

who makes the order for it as well as the one upon whom the order is made, and also the person who actually and really carries it into the Indian country, all contribute to the same result, all do something to produce the act done, and under the law they would all be guilty of introducing the spirituous liquor. If the
16 proof in this case shows that Mr. Sarles, the defendant, made an order to brewing establishments in St. Louis or any other place outside of the Indian country to send to him in the Indian country or to places that he directed it to be sent in such country lager beer, and lager beer is a spirituous liquor, and the proof is sufficiently certain to show that state of case beyond any reasonable doubt, then the evidence shows a violation of the statute that I have read to you, and the defendant would be guilty because his act contributed to the result. If it had not been for his order the spirituous liquor would not have been sent to him. His act, together with the act of other parties jointly and understandingly done, produced the result, and in such a case all parties who thus contribute to a condition produced under the law are responsible and subject to whatever penalty may be attached to the act. Now, we are to ascertain whether this substance called lager beer is a spirituous liquor according to the meaning of these words as used in the statute that I have read; and first it becomes material to ascertain whether or not this substance will produce intoxication. The court is authorized to tell you that lager beer such as is generally known by that name will produce intoxication. The court has a right to tell you this because it is a fact of such common knowledge that lager beer contains the intoxicating principle called alcohol that the court may take judicial notice of it and tell it to you as a fact the same as though it were established before you by testimony. But in this case you need not rely upon this fact which the court gives you as one of which it may take
17 judicial notice, for evidence has gone to you showing that at the places where the beer was sold which was ordered brought into the country by the defendant men who had been drinking the beer were seen in a state of intoxication. Then you have before you evidence which you may consider as tending to show that it will produce intoxication. As to whether or not lager beer comes within the purview of the words of the statute is a question which makes it necessary that we should give you an interpretation of this statute. It is a section of the law that in my judgment is to be construed in the light of contemporaneous history, in the light of the condition of things at the time of its enactment, and the condition of things now. In order that we may get at the purpose of the Congress of the United States in enacting this statute, and that we may interpret, not construe, the words used (because I do not think there is any ground for construction, but that it is simply a question of interpretation that arises upon the statute), we have the right to apply the rules that are prescribed by the highest court of the country to be used in the interpretation, or construction, if you please, of statutes. In the first place, we are authorized to take judicial notice of the historical fact that one of the great objections

upon the part of the Indians to being removed from their homes in the older States east of the Mississippi, where there was a higher civilization surrounding them than there would be out in this then wild country, was that it was a frontier country, a country that had to be settled by the pioneer, where police regulations were not so effective as there would be in older States.

18 This condition caused them to ask that the Government of the United States should pledge to them security and protection in their new homes if they consented to go. Intoxicating liquor was one of the things that they recognized as the greatest evil to their people. This fact is so notorious and is so well recognized that it has become a part of the public history of the country that the court can take judicial notice of it. It therefore can say to you that as affecting these Indian people it is one of the greatest evils with which they have come in contact, and it has swept almost whole tribes out of existence. There are a few left of the Delaware tribe of Indians up in this Indian country. That tribe was at one time one of the most powerful people of that race upon the continent, and its people have been largely swept out of existence, owing to a great extent to the use of intoxicants by them. There is now only left of that once powerful tribe of people about 100. The wise and good men who were the leaders of these Indian people knew the baneful influence and the destructive power of drink, and they asked that the Government of the United States should not only say in its treaties that they should be protected, they and their young men and people generally, but that laws should be enacted making it a penalty upon the part of any person to introduce into that country spirituous liquors which would work the destruction of their people. I fully agree with my brother Judge Knowles when he says, *In re* McDonough, 49 Fed. Rep., 360, "that the manifest purpose of this statute was to prevent intoxication." If that be true we have the key which opens the way to the correct interpretation of this law. When-

19 ever we find that which produces intoxication we will find that substance which comes within the definition of spirituous liquors, and we will then have found that which has been prohibited by the statute, and we have found that substance which the statute says shall not be introduced for any purpose. The words "ardent and spirituous" are used indiscriminately in this statute as having the same meaning; if not, the section becomes nonsense. Why would the Congress of the United States expressly prohibit the introduction for any purpose of ardent spirits into this Indian territory and fail to provide a penalty as to any other class of liquors that did not comprehend ardent spirits? That would be foolish. We are never to construe a law as nonsense when it can be avoided, but we are rather to construe all of its terms as having force. There is no trouble about the rule for the construction of statutes. The Supreme Court of the United States almost every year of its existence has had that question before it, and very recently it has given us rules for the interpretation not only of ordinary statutes, but penal statutes as well. Then, manifestly, if the object intended by

this statute was to prevent the destruction of Indians by drunken-ess, as well as to prevent the commission of crime which invariably follows as the consequences of drunkenness and debauchery in a country where police regulations are limited, it should be construed so as to give effect to the object designed, and to that end all its provisions must be examined in the light of surrounding circumstances. This has been very recently declared to be the correct rule of construction laid down in the case of *In re* Ross, 140 U. S., 453, and
20 this whole doctrine in regard to the construction of statutes, and especially penal statutes, has been laid down by the Supreme Court of the United States in the case of U. S. *v.* Lacher, 134 U. S., 624. Among other things it was there said by the court that "the proper course in all these cases is to search out and follow the true intent of the legislature and to adopt that sense of the words which harmonizes best with the context and promote in the fullest manner the apparent policy and objects of the legislature." The object of the statute was to prevent the drunkenness of these people, who are rightfully in the Indian country, and to protect them against the effects of drunkenness and debauchery. The question now presents itself whether or not this statute is capable reasonably and rationally of such interpretation as to make the words "any spirituous liquors" include that substance which produces intoxication and which is called lager beer. The question comes up as to whether or not this article is embraced within that expression. There is a difference of opinion among courts, and respectable courts, too, as to the meaning of these words. This difference of opinion, in my judgment, originated from considering the kind of spirits with reference to the method of making them rather than from their quality. This statute evidently intended to prohibit that which would be injurious to the people in that country, because it would intoxicate them. Beer is defined to be a preparation made by fermentation, which contains alcohol. Alcohol, by the definition of Mr. Webster, is that which may possess a spirituous quality.
21 It is the spirituous quality of whatever substance it is in. Beer is thus defined: "An alcoholic liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water." Cent. Dict., 503. It is defined as an article that contains alcohol. Lager beer is, so called because it is contemplated that it has been stored some time after having been made. The material question under the statute is whether or not it is intoxicating. If it produces that result, according to my construction of this law, taking into contemplation its purpose, the reason for its enactment, the condition to which it was intended to apply, it comes within the definition of the word "spirituous," which Mr. Webster says means having an active power or property, and as used in this statute I think it means having an active power or principle of intoxication. This court has always held that whiskey, brandy, beer, and wines, or anything that has a spirituous or intoxicating principle in it, or any substance of which it was a part, so that when it was used in that country as a beverage it would produce that result,

came within the provision of this statute, and the position of the court in the construction of this statute is borne out by Chief Justice Merrimon, who delivered a very able opinion of the supreme court of North Carolina in the case of the State *v.* Giersch, 1 S. E. Rep., 193. The words of the North Carolina statute were precisely the words used in this statute. It was a statute enacted to secure what is commonly called "local option"—that is, permitting the people of each township to vote for or against license to sell spirituous liquors.

This statute prohibits the introduction of spirituous liquors.

22 The supreme court of North Carolina, in the construction of these words, used in this well-reasoned case language which indicates that it took into consideration the condition there that was sought to be changed, and with that condition in view it interpreted the meaning of the statute of the State, arriving at the same conclusion as to the meaning of the words "spirituous liquors" that this court arrives at. In viewing this North Carolina case we are convinced that the courts who have arrived at an opposite conclusion as to meaning of the words "spirituous liquors" from the North Carolina court and this court have fallen into an error, and that error arises from the fact that they conclude to make a spirituous liquor you must distill it, when the word spirituous does not mean any such thing as that. It is defined as a liquor that is ardent—that is, active in its principle—that will produce intoxication. That is the definition given by Mr. Webster, and it has reference to the quality of the liquor. When you come to the origin of it, when you come to the method by which it is made, you find that spirituous liquor, liquor having the ardent principle in it, having the intoxicating principle in it, is sometimes made by distillation and sometimes by fermentation. The intoxicating principle called alcohol is also made, as Judge Merrimon clearly shows, by fermentation, and it is only separated by distillation from the other qualities or properties. If this be true, then the intoxicating principle or the alcoholic principle is that which makes it a spirituous liquor, and that it is made by fermentation, and that it exists in lager beer, and the court here tells you judicially that it does, because the law says that the court may take judicial notice that there is

23 an alcoholic principle in lager beer. I say if it be true that it is produced by fermentation, and that is true, then why is it necessary that we should look any further, when the article is complete as a spirituous liquor if it contains alcohol? It is not distillation that gives it a spirituous quality. Spirituous means active. It means lively. It means something that will produce active or lively results. It does not mean necessarily something that has been run through the worm of a still. Fermentation is a process which extracts from the grain, from the malt, from the barley, from the corn, or from whatever is used the principle that gives it a spirituous quality, the principle that makes it alcohol, the principle that produces intoxication; and whenever you have a fermented liquor producing alcohol you have a spirituous liquor in the sense of the statute, and you have a liquor that is prohibited by this statute, because it produces intoxication, because it produces vice, because

it produces crime, and because if left alone and not restricted it will drown out these people whom the Government have solemnly time and again promised to protect and support against this evil and all others.

The court in the North Carolina case, referred to above, said: "The term liquor in its most comprehensive signification implies fluid substances generally, such as water, milk, blood, sap, juice; but in its more limited sense and its more common application it implies spirituous fluids, whether fermented or distilled, such as brandy, whiskey, rum, gin, beer, and wine, and also decoctions, solutions, tinctures, and the like fluids in great variety. The terms spirit or spirits has a general meaning as applied to fluids, mostly of a lighter character than ordinary water, obtained but not produced by distillation, but as applied par-
24 ticularly to liquors they signify the essence, the extract, the purest solution, the highly rectified spirits, the pure alcohol contained in them. The spirit of liquors is really the alcohol in them. It is this characteristic, this essential element, that makes them spirituous, that gives to all liquors of whatever kind their intoxicating quality and effect. Alcohol, this essential element in all spirituous liquors, is a limpid, colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source, the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit, the alcohol, from the mixture, whatever it may be, in which it exists."

I again repeat that you do not have to have distillation to make spirituous liquors. The fact, then, that distillation did not exist in the preparation of this lager beer does not make it any the less spirituous liquor. It is not distillation that determines this spirituous character. It is the quality of the article which is the evidence of whether it has in it the ardent principle called alcohol, the spirituous quality that gives it the name of spirituous liquor; and it is not how it was made that determines this quality.

The supreme court of North Carolina further says:
25 "Spirituous means containing, partaking of spirits: having the refined, strong, ardent quality of alcohol in greater or less degree; hence spirituous liquors imply such liquors, as above defined, as contain alcohol and thus have spirits, no matter by what particular name denominated or in what liquid form or combination they may appear."

I may here remark, What use would it be for the courts of the United States to enforce the statute enacted by Congress prohibiting brandy and whiskey from being introduced into the Indian country and at the same time to permit car-loads and tons of lager beer that makes men drunk to be taken in without hinderance or with-

out interruption? It never was so intended, never was so contemplated by the law-makers, and it requires no forced interpretation of this statute to enable us to arrive at this conclusion. When you take the definition of the words "spirituous liquors" as given by this eminent court I have referred to, you have exactly that which applies sensibly and rationally to the interpretation of that section of the statute in question, taking into consideration the purpose sought to be accomplished by the Congress which passed it.

The North Carolina court further says: "Distilled liquors, fermented liquors, and vinous liquors are all alike spirituous liquors. These liquors respectively may have different degrees of spirit in point of fineness and strength. Distilled liquors may be stronger or weaker, according to the quantity and quality of alcohol in them, and so of the other kinds mentioned. We know from common observation and knowledge and it is generally admitted as a physical fact, not denied in this case, that lager beer and wine contain alcohol, and generally in such quantity and degree as
26 to produce intoxication. These liquors are therefore spirituous and obviously come within the meaning and are embraced with the words spirituous liquors as used in the statute, unless there is something in the statute that shows that these words were intended to have a more limited application and to exclude such beer and wine. The closest reasonable scrutiny of the statute—its terms, phraseology, connections, and purposes—shows no such narrow application of the words 'spirituous liquors' employed in it so as to exclude such beer and wine. * * * and the manifest purpose is to suppress drunkenness and the attendant evils produced by the free use of intoxicating spirituous liquors. The terms are not any distilled spirituous liquors, not any fermented spirituous liquors, but they are spirituous liquors and any spirituous liquors. How sweeping! The purpose being obvious, the language of the statute, its part and its whole, must receive such reasonable interpretation as will effect its purpose."

It was obviously the purpose of the statute under which this indictment was drawn to keep out of the Indian country liquors which would cause intoxication in that country and have a tendency to destroy its people. Its purpose was to suppress liquor of this kind and to prohibit its being taken in there. Then, unless we are doing violence to the language used, we are to interpret or construe the statute by that rule of interpretation or construction which would enable us to effectuate the purpose of those who passed the law. Can it be said without absurdity that it was the purpose of the Congress of the United States to stop up the spicket of the barrel that contained this principle of drunkenness by pro-
27 hibiting the introduction of whiskey or brandy and to leave the head open by permitting the introduction of lager beer, which, if not prohibited, would flow in there in rivers and produce baneful effects almost beyond contemplation? The court fully adopts the language used by the supreme court of North Carolina. It fully takes into consideration the purpose of Congress in enacting this statute—that it was to prevent drunkenness. When we come to

apply the word we find that we have a meaning that is rational, that is sensible, that fully consummates the purpose of the statute, and which is authorized by the authors of lexicons defining the term "spirituous liquor." I say to you in this case that if you find beyond a reasonable doubt from the evidence that the defendant ordered quantities of lager beer to be brought into that country to him or to other parties who he designated, and that such lager beer was shipped from some point outside of the Indian country to him, or others upon his request, inside of it, it would be your duty to find the defendant guilty as charged in the indictment.

The court charges you that, in the light of the law, lager beer is spirituous liquor, and its introduction is prohibited by the statute of the United States, and such introduction, committed either by the direct act of the defendant or done, as it may be, indirectly, as heretofore defined to you, is a violation of the statute, and if this state of facts is shown by the evidence beyond a reasonable doubt, it would be your duty to convict the defendant. This statute is a very important one. Its rigid enforcement tends largely to prevent the commission of the highest crimes in that country, and that this fact is a matter of common knowledge to all who are in any way conversant with the condition of that country. You take
28 the law from the court, you see what the facts are, and you apply the law to the facts as you find them. After you have done this, if there appears a state of case that satisfies you as reasonable men that under the law as I have given it to you the defendant has violated the law, it is your duty to convict him. Satisfying you as reasonable men, so that you would believe the conclusion produced and act upon it — if it were a matter of the highest concern to one of your fellow-citizens growing out of the ordinary affairs of life is what is meant by proving a case beyond a reasonable doubt, or proving it so that all doubt for which good reasons can be given are driven from the case. Then, if this case is proven in that way, guilt is established. If not proven, to that extent there is a failure upon the part of the Government to show guilt. The fact that a revenue officer of the Government of the United States may have issued license authorizing the traffic in lager beer in the Indian country has nothing to do with your or my enforcement of this statute. That act comes under the revenue law, and the mistake of a revenue officer cannot shield the defendant when he has violated a section of the intercourse law.

Gentlemen, you will take this case and make up your verdict.

29 The defendant at the time objected to the instructions of the court so given, and his objection being overruled he at the time excepted.

And thereupon the jury retired to consider of their verdict, and afterwards returned into court the following verdict:

"We, the jury, find the defendant guilty as charged in the within indictment."

(Signed) A. J. ROBERTS, *Foreman.*

And afterwards, on the 18th day of Oct., 1892, the defendant filed his motion for a new trial in words and figures following:

In the District Court of the United States for the Western District of Arkansas.

THE UNITED STATES }
vs.
R. SARLLS. }

The defendant, R. Sarlls, moves the court to set aside the verdict of the jury in this cause and grant him a new trial therein for the following reasons:

First. Because the court erred, to the prejudice of the defendant, in admitting the testimony of H. S. Ellard at the trial as to the partnership of said Ellard and defendant in selling beer in partnership in the Indian territory.

Second. Because the court erred in admitting the testimony of Ellard and other witnesses as to the sale of beer.

Third. Because the court erred in admitting the testimony of W. J. Wilson as to the introduction of lager beer, it being shown to be a malt liquor.

Fourth. Because the court erred in refusing to exclude from the jury the testimony of William Hasson and James Boling as to the introduction of beer or malt liquor into the Indian country.

Fifth. Because the court erred in instructing the jury that lager beer and malt liquor is included in the term spirituous liquors and the introduction of it into the Indian country is prohibited by the statutes of the United States.

Sixth. Because the court erred in refusing to instruct the jury on the request of the defendant that lager beer and malt liquor is not included in the term spirituous liquors and its introduction into the Indian country is not prohibited by section 2139 of the Revised Statutes of the United States.

WM. M. CRAVENS,
Att'y for Defendant.

Which motion for a new trial was overruled by the court, and to the action of the court in overruling said motion the defendant at the time excepted and now tenders this bill of exceptions, and prays that the same may be signed and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge.

31 *Assignment of Errors.*

In the United States District Court for the Western District of Arkansas.

UNITED STATES } Introducing Beer in the Indian Country.
vs.
R. SARLLS. }

The defendant, R. Sarlls, says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

1st. That the matters charged in the indictment against him do not constitute a crime under the common law or any statute of the United States.

2nd. In that the court admitted the testimony of H. J. Ellard at the trial as to the partnership of said Ellard and the defendant in selling beer in the Indian territory and in overruling the defendant's objection to the testimony of the said Ellard as to the introduction of lager beer or malt liquor into the Indian country.

3rd. In that the court admitted the testimony at the trial of this cause of W. J. Wilson as to the introduction of lager beer into the Indian country.

4th. That the court refused to exclude from the jury the testimony of William Hasson and James Boling as to the introduction of beer into the Indian country.

5th. That the court instructed the jury that lager beer and malt liquor is included in the term spirituous liquor as used in the statute and the introduction thereof into the Indian country is prohibited by the statute of United States.

6th. That the court refused to instruct the jury on the request of the defendant that lager beer and malt liquor is not in-
32 cluded in the term spirituous liquors and the introduction thereof into the Indian country is not prohibited by section 2139 of the Revised Statutes of the United States.

7th. That the court overruled defendant's motion for a new trial.

Wherefore the said defendant, R. Sarlls, prays that the judgment and sentence of the said district court of the United States be reversed and that he be discharged.

R. SARLLS,
By WM. M. CRAVENS, *His Att'y.*

33 In the United States District Court for the Western District of Arkansas.

UNITED STATES } Introducing Beer in the Indian Country.
vs.
R. SARLLS. }

To the clerk of the district court of the United States for the western district of Arkansas:

The petitioner, R. Sarlls, respectfully represents that at the August term, 1892, petitioner was convicted of introducing lager beer in

the Indian country, and judgment and sentence upon said conviction was rendered by the court that he pay a fine of two hundred and fifty dollars and be imprisoned three months.

Petitioner alleges in the record and proceedings of the trial in his cause there is manifest error to his prejudice.

He therefor- prays that a writ of error from the Supreme Court of the United States be issued under seal removing said cause and the record therein to the Supreme Court of the United States in order that the same may be there examined and the said errors corrected and the judgment against him be reversed.

R. SARLLS.
By WM. M. CRAVENS, *His Att'y.*

31 Know all men by these presents that we, R. Sarlls, as principal, and The United States, as sureties, are held and firmly bound unto the United States in the full and just sum of one thousand dollars, to be paid to the said The United States, — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a regular term of the district court of the United States for the western district of Arkansas, in a suit depending in said court between The United States and R. Sarlls, upon an indictment for introducing lager beer, called spirituous liquors, into the Indian country, in the western district of Arkansas, a judgment was rendered against the said R. Sarlls that he pay a fine of two hundred & fifty dollars and be imprisoned three months in the United States jail at Ft. Smith, Arkansas; and the said R. Sarlls having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the same in the aforesaid suit, and a citation directed to the said United States, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of its next term:

Now, the condition of the above obligation is such that if the said R. Sarlls shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, and appear when lawfully required in said district court to abide its judgment, then the above obligation to be void; else to remain in full force and virtue.

R. SARLLS. [SEAL.]
T. N. FOSTER. [SEAL.]

Sealed and delivered in presence of—

Approved by—
I. C. PARKER,
U. S. Dist. Judge.

Copy.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States and R. Sarlls, a manifest error hath happened, to the great damage of the said R. Sarlls, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court; the 5th day of November, in the year of our Lord one thousand eight hundred and ninety-two.

STEPHEN WHEELER,
Clerk of the District Court of the United States for the Western Dist. of Ark.

Allowed by—

_____,
— Justice of the Supreme Court of the United States.

36 UNITED STATES OF AMERICA, *ss:*

To William H. H. Clayton, Esq., United States attorney for the western district of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the western district of Arkansas, wherein R. Sarlls — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Isaac C. Parker, judge of the district court of the United States, this 5th day of November, in the year of our Lord one thousand eight hundred and ninety-two.

ISAAC C. PARKER,
U. S. Dist. Judge.

I, William H. H. Clayton, U. S. district attorney for the western district of Arkansas, do hereby accept service of the within citation this 14th day of Nov., 1892.

WM. H. H. CLAYTON,
U. S. Dist. Attorney.

37 I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct transcript of the record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 14th day of November, A. D. 1892.

(The Seal of the District Court, Fort Smith, Western District of Ark., U. S. A.)

STEPHEN WHEELER, *Clerk.*
By J. M. DODGE, *D. C.*

Endorsed on cover: Case No. 15,237. W. Arkansas D. C. U. S. Term No. 872. R. Sarlls, plaintiff in error, vs. The United States. Filed January 3rd, 1893.

Advanced for the ... Nov ... 1893

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JAMES. H. McKENNEY,
CLERK.

In the United States Supreme Court,

OCTOBER TERM, 1893.

R. SARLLS vs. THE UNITED STATES.

No. 872.

BRIEF OF PLAINTIFF IN ERROR.

Mr. Sarlls is an attorney at law, but not enrolled as such in this court. With my permission he has prepared this brief and I sign it as

In the United States Supreme Court,

OCTOBER TERM, 1893.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendant was indicted on the 15th day of August, 1892, and convicted in the District Court of the United States for the Western District of Arkansas, sitting at Fort Smith, for introducing lager beer into the Indian Country, in violation of Section 2139 of the Revised Statutes of the United States.

The evidence in the case shows that defendant was interested in a wholesale beer business, carried on by one H. J. Ellard, in his own name, in the town of McAlester, Indian Territory, under license from the United States to carry on said business at said place. That six carloads of W. J. Lemp's lager beer were shipped from St. Louis, Missouri, to said Ellard by order of defendant, between February and the first of July, 1892, and sold.

The theory upon which the defendant was convicted is that the introduction into the Indian Territory of malt liquor, prior to the amendment of Section 2139, by Congress, prohibiting the introduction of lager beer into said Nation, is in violation of said Section.

The proof shows that the said beer was a malt liquor, and not a spirituous liquor. To the introduction of the evi-

dence that the said beer was so introduced, the defendant duly excepted at the trial below.

For errors, we refer to Bill of Exceptions, and Errors, (Trans. p. ———.)

This case comes here by writ of error, and the only questions are: Is the Indian Territory, "Indian Country?" Do the facts given upon the trial sustain the verdict? or whether the introduction of lager beer, which is a malt liquor, into the Indian Nation is in violation of Secton 2139 of the United States Statutes at large before it was amended by the 52nd Congress?

ARGUMENT.

The Section provides as follows:.

"No ardent spirits shall be introduced under any pretence into the Indian Country.

"Every person who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wines to any Indian under the charge of an Indian superintendent or agent, or introduces, or attempts to introduce any spirituous liquors or wines into the Indian Country, shall be punished, etc."

Matthews 5-61

The term, "Indian Country," says Mr. Justice ~~Clifford~~ in *exparte* Crow Dog 109 U. S. ~~1032~~, (quoting Justice Miller,) "That all the country described by this act of 1834 as 'Indian Country' remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be 'Indian Country' whenever they lose that title, in the absence of any different provision by treaty or by act of Congress."

This definition though not now expressed in the Revised Statutes, is implied in all other provisions.

It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of the "Indian Country," says the Court.

It cannot be said that because the Indians were found here by Columbus that they had original title to the whole of North America, or this question would not have arose in American jurisprudence. They certainly cannot be said to have the original title to what is known as the Indian Nation. The 52nd Congress realizing this situation named the Indian Territory in amending Section 2139, Revised Statutes, so as to include beer. Neither are the five civilized tribes under the charge of a superintendent or agent within the meaning of said statute.

The popular signification of "ardent" in connection with spirits is "distilled." Mr. Worcester so defines it in his dictionary. He defines it as a term applied to all inflamable liquors obtained by distillation, such as rum, brandy, gin and whisky.

Mr. Webster defines the word "spirituous" as rum, whisky, brandy and other distilled liquors as contradistinguished from wine and malt liquors. Mr. Webster also defines the term "ardent" when used in connection with the word "spirituous" as distilled spirits.

The sole question, therefore, is whether lager beer, which is a malt liquor, is included within the term "spirituous liquors" as used in this section.

In view of these authorities, certainly under a popular signification and understanding of the terms employed in the Statute, the Court cannot hold that the defendant is charged with an offense against the laws of the United States.

Next. It is a well settled rule of construction that a penal statute must be construed strictly. That where there is no ambiguity in the language, there is no room for construction. And that only those offenses that are fairly included within the letter of the statute, are embraced within it.

It is true that the term "strict construction," as is said by Mr. Sutherland in his recent work on statutory construction, is a relative term, and varies according to the nature of the crime and the severity of the penalty. "Strict construction" will not be permitted to defeat the obvious intention of the legislature. But the intention must be collected from the words of the statute. If these words are plain, and have a definite legal meaning the Court cannot extend the statute beyond its letter. Where the language of a statute is plain and explicit there is no room for construction.

Chief Justice Marshal, in United States vs. Wittenberger, 5 Wheaten, 76, says: "It would be dangerous, indeed, to

carry the principle that a case which is within the reason or mischief of the statute is within its provisions, so far as the punishment of crime not enumerated, because it is of equal atrocity and of a kindred character with those which are enumerated."

Chief Justice Waite, in United States vs. Reese, 92 U. S., says: "If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able with certainty to know when he is committing a crime. It would certainly be dangerous if the legislature could set a net large enough to catch possible offenders, and leave to the court to step inside and say who could be rightfully detained and who set at large."

Abbott, J., said: "It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty by a court where the expressed words of the act of Parliament do not authorize it." The defendant has been the subject of the latitudinarian construction referred to by Mr. Abbott.

The proposed effect of this prosecution is to destroy the use and purpose of the word "wine" in Section 2139, United States Revised Statutes, and to insert between the lines therein the words "lager beer or malt liquor." It seems a little strange to us that Congress should use the term "wine" in said Section, if they used the phrase "spirituous liquors" in a sense so broad that it includes wine, likewise including lager beer. Under the rule that each word in a statute has an office and must be given a meaning consistent with the other words used if it can be done, we think excludes any construction of said section that would include lager beer, for the reason that by giving all the words their literal and commonly accepted sense, harmonizes the language and gives effect to the statute. On the other hand, the word "wine" is destroyed and made redundant and useless in said statute. If the phrase "spirituous liquors" include all liquors that are

intoxicating or that contain alcohol, as the lower court insists, and, where a word used in a statute has somewhat different meanings, and is sometimes used generically, and more often in a more confined and restricted sense, when to use it with its general or enlarged meaning will destroy the office and sense of another word or words in the same statute, it is presumed, we think, that the legislature used it purposely in its more confined or restricted sense.

Again, a well known rule of construction is, where a word is repeatedly used in statutes, it is taken to be always used in the same sense, or in the sense that the word was first used, if no designated meaning is given it in a particular statute by the legislature.

In enacting the revenue laws of the United States, the terms "spirituous liquors" or "distilled spirits," and "malt liquors," are not used as convertible or synonymous terms. The whole system of revenue restrictions hold them apart, as opposite and distinct things, in providing for their sale and manufacture, which to our minds, amounts to legislative construction.

Section 3244, Revised Statutes of the United States, in providing license for wholesale dealers in malt liquors, reads as follows:

"Wholesale dealers in malt liquors shall pay fifty dollars. Every person who sells or offers for sale, malt liquors in larger quantities than five gallons at one time, *but who does not deal in "spirituous liquors,"* shall be regarded as a wholesale dealer in malt liquors."

Does not Congress here say that the term "spirituous liquors" does not include malt liquors?

Again, in the year 1864, Section 2140, United States Revised Statutes was enacted or revised, using the same terms, to wit, "spirituous liquors and wines" in relation to the same subject that Section 2139 relates to. Can it be reasonably said that these words are used in any of these statutes, save and except in the same meaning that they were

used in the said internal revenue statute, naming and regulating them as separate and distinct things?

The act of the 52nd Congress in amending the section under which this prosecution is maintained, so as to include lager beer, we think should be taken as controlling evidence that it was not before included.

The statute, taken in connection with the history surrounding it, seems to show why beer is not included in it. The act was passed in the year 1832. It is said before lager beer was manufactured in this country, and prior to its being judicially determined to be intoxicating, its character, together with the want of means of transportation at that early date, rendered legislation needless. It is also a matter of common knowledge in the Indian Territory, that the Attorney General instructed the United States Attorney of this Territory, and the Western District of Arkansas, that lager beer was not prohibited by Section 2139.

But aside from all considerations of literal construction, the terms here in question have received what may be termed a judicial construction of the highest courts of the several states in the Union, as well as some of the Federal Courts of the United States.

Smith, J., in 51 N. H., 569, said: "In the first chapter of the General Statutes it is enacted that in construing the statute, the words 'spirituous liquors' shall be taken to include intoxicating liquors, and all mixed liquors, any part of which is spirituous or intoxicating. The respondents have not contended that ale, porter and cider are not intoxicating liquors, or that the sale of liquors is not prohibited by the Statute, but they say that the indictment does not charge them with this description of liquors, hence no evidence of the sale of ale, porter, or cider is admissible. This objection is well taken. The indictment charges the sale of 'spirituous liquors' only. Fermented liquors are not, in common parlance, 'spirituous liquors.' The latter term is popularly used to designate distilled liquors as distinguished from fermented

liquors. It implies that the beverage is composed in part or wholly of alcohol extracted by distillation. It does not apply to a liquid whose alcoholic properties are latent, and exist substantially in the same form as in the original material from which the liquid is made. The fact that the ale contains from four to ten per cent. of alcohol which can be separated from it by distillation does not bring ale within the class of liquors called spirituous."

Deny, J., 5 Blackford, 118, said: "This was an indictment for retailing port wine by small measures without license. The prosecution is founded upon that part of the act relative to crime and punishments which forbids the sale of spirituous liquors by a less quantity than a quart at a time, without license. That is a penal statute, and must be strictly construed. We are not at liberty to extend its meaning beyond its exact literal sense. Spirits is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of grapes, produced by fermentation. We can not so confound the signification of these general terms as to call wine a spirituous liquor. We think port wine is not within the provisions of the Statute. If its omission is an evil, the courts have no power to remedy it."

Justice Woods, in 53 American Reports, 82, said: "The words 'spirituous liquors' do not include wine or other fermented liquor, for they imply that the beverage is composed in part or fully of alcohol extracted by distillation. Ale, porter and beer, are neither the result of distillation nor the fermentation of the juice of any kind of fruit. Webster defines beer as 'a fermented liquor made from any kind of malted grain with hops or other flavoring material,' wholly different from spirituous liquors, lager beer is a malt liquor and not a spirituous liquor."

State vs. Bush, R. I., 198.

State vs. Thompson, 20 W. Va., 674.

Metcalf, J., in 68 Mass., 502, said: "All spirituous liquors are intoxicating, yet all intoxicating liquors are not

spirituous. In common parlance, spirituous liquors means distilled liquors. Fermented liquors, though intoxicating, are not spirituous."

Strong, J., in 20 N. Y., 248, said: "The term wine includes the fermented juice of the grape and possibly of other fruits. Neither is a spirituous liquor, as spirits are manufactured by distillation, whereas ale is produced by fermentation."

Coleman, J., in Tucker vs. State, Alabama, 8 South, Rep., Jan. 30, 1891, said: "Malt liquors have neither vinous nor spirituous liquors as an ingredient. It has alcohol produced by fermentation through which it must pass to become a beverage. Spirituous liquors, vinous liquors and malt liquors are not synonymous terms, but each refers to a liquor separate and distinct from each other. Lager beer is a malt liquor, and the courts take judicial knowledge of this fact. The Statute having prohibited the sale of spirituous and vinuous liquors only, malt liquors are not included. It was error, therefore, to have charged the jury that a sale of lager beer was in violation of the Statute."

The Supreme Court of Tennessee, in 2 Humphrey, 202, in passing upon a similar Statute, said: "The question for consideration is, whether wine is a spirituous liquor, within the meaning of the Statute? We think it is not. Wine is a fermented liquor. Spirits are distilled liquors. This distinction exists not only in common parlance, but is recognized by chemists and physiologists. We therefore think that the words 'spirituous liquors' embrace those which are produced by distillation, but not those produced by fermentation."

We cite the following additional authorities in support of this proposition:

Commonwealth vs. Herrick, 6 Cushings, 465.

2nd Gray, 501.

4 Gray, 18.

Anderson's, Black's and Abbott's Law Dictionaries.

Mr. Bishop, in his work on Statutory Crimes, Sec. 1008, defines the term "spirituous liquors" as distilled liquors. He says that the term in penal statutes does not include fermented liquors.

In the case of Marvin vs. Ladue, 3 Denio, 437, the following is found: "The words 'strong liquors' included beer, but that the term 'spirituous' did not."

Bryant, District Judge of the Eastern District of Texas, was the first United States judge to our knowledge holding that to introduce lager beer into the Indian Nation was not in violation of said Section 2139. Opinion not published.

District Court, D. Montana, Feb. 5, 1892, Knowles, District Judge, held that beer is not a "spirituous liquor" within the meaning of Section 2139, United States Revised Statutes, denouncing the offense of selling spirituous liquor and wines to Indians. (49 Fed. Rep. 360.) In re McDonough.

Mr. Black, in his very recent work on intoxicating liquors, Sec. 3, in discussing the term "spirituous liquors" says: "There are a few decisions in which the Courts have given to this term another construction than that indicated in the preceding section.

"In North Carolina, it has been held that the phrase 'spirituous liquors' as used in the Statute, includes fermented liquors, such as wine and beer, as well as distilled liquors. And there was also a similar ruling once made in Tennessee. This, however, was in a case where the Statute simply prohibited the sale of 'spirituous liquors' on Sunday, and the Court felt constrained to construe the phrase liberally to prevent evasions and subterfuges. And even with this reason, for the doctrine, the case referred to was overruled in a later decision, wherein it was held that the term in question included only distilled liquors, and not wine, ale or beer. This last interpretation, which is certainly consonant with both reason and the right use of language, is the one which

all the courts are now agreed upon, with the exception of the case cited from North Carolina."

In view, therefore, of the Statute itself, and the authorities which we have presented under both the legal and popular signification and understanding of the terms used in this Statute, it strikes us that for a Court to hold that the defendant is chargeable with an offense against the law of the United States, would be little short of judicial legislation. The Courts must take the law as they find it, and not resort to their own reasoning about the intention of the legislature to establish crime without first pointing out the ambiguity in the Statute. The lower Court's construction of this Statute may be followed by a forfeiture of property. This renders strict construction necessary. A statute which must, on account of its object or motive, be construed strictly, must be read without expansion beyond its letter. Remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy. But considerations of the old law, the mischief and the remedy, are not enough to bring cases out of the terms within the purview of the statute. The rule pithily stated by Mr. Sutherland, citing 36 Conn., 77, is: "A case may come within a remedial statute, unless the language excludes it. While it is excluded by a penal statute unless the language includes it."

We respectfully represent, therefore, that the judgment of the lower Court ought to be reversed and rendered by this Court, for upon every known and accepted rule of construction, the defendant should have been discharged by the lower Court.

Respectfully submitted.

Brief by R. SARLLS,
Plaintiff in Error.

In addition to the foregoing authorities we beg to refer specially to:

Cone v. Livermore 10 Mass. (4 Gray) 20.
" " Burke 81 " (15 ") 408.
11 Eng. & Am. Ency. of Law p. 567 et seq.
12 Cush. 272. 1 Baxter (Tenn.) 15.

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In the Supreme Court of the United States

OCTOBER TERM, 1893.

R. SARLLS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 872.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

R. SARLLS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 872.

Plaintiff in error was convicted in November, 1892, in the district court of the United States for the western district of Arkansas, on an indictment which charged that he had on the 1st day of March, 1892, at the Choctaw Nation, in the Indian country, unlawfully introduced into the Indian country, in said district, spirituous liquors, viz, 10 gallons of lager beer, etc.

STATEMENT OF FACTS.

The evidence proved that in March, 1892, the plaintiff in error and one H. J. Ellard were partners in trade in the wholesale and retail liquor business at McAlester; that they had ordered from St. Louis, Mo., and had shipped to them by rail from McAlester several carloads of Lemp's pale and dark beer in bottles and barrels; that

they had a license and paid tax to the Government for privilege of selling beer; that they did sell this beer at various points in the Indian country; that this was ordinary larger beer, and that it was intoxicating (pp. 7, 9, and 11).

The grounds of error assigned are.

(1) The action of the court in overruling defendant's motion for a new trial.

This court has repeatedly held that the action of a court in granting or refusing to grant such a motion can not be assigned for error here. (*Schuchardt* v. *Allens*, 1 Wall., 359; *Insurance Co.* v. *Barton*, 13 id., 603; *Railway Co.* v. *Heck*, 102 U. S., 120.)

(2) The action of the court in admitting the testimony of H. J. Ellard at the trial as to the partnership of the said Ellard and defendant in selling beer in the Indian Territory.

Whether the objection here goes to the admission of evidence of the partnership, or that the partnership sold beer in the Indian Territory, or both, is not clear. But it is immaterial, because it is apparent that the fact of the partnership and of the sale of the beer was shown only to establish the identity of the plaintiff in error and as a connecting link in the chain of testimony tending to establish the offense with which he was charged. In no aspect of it was it error of which the defendant could complain.

(3) Each of the other grounds assigned as error is directed to the proposition on which this appeal appears mainly to rest, viz, that lager beer is not a spirituous liquor within the meaning and intendment of the statute.

ARGUMENT OF THE CASE.

The indictment seems to have been drawn under section 2139, Revised Statutes, which provides:

> No ardent spirits shall be introduced under any pretense into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department.

The single question, then, presented by this assignment of error is, Is lager beer embraced within the term "ardent spirits" or "spirituous liquors," as employed in this section?

It will be observed that this section was originally adopted on the 9th of July, 1832, and has been since amended by acts of 14th of March, 1864, and of 27th February, 1877.

It is a historic fact, of which the court may take notice, that lager beer was not known in this country when this law was first enacted.

The learned judge who presided at the trial of this cause in the court below has embodied in the charge delivered by him to the jury on the trial a statement of the history

of the policy of the Government in its care and supervision of the Indians, as well as a statement of the law as construed and expounded by the courts in cases arising under this section.

It is proper always in seeking to ascertain the mind of the legislature as expressed in a statute, to consider that statute in connection with others *in pari materia*. And we find in chapter 180, 23 United States Statutes, p. 94, the following provision:

> For detecting and prosecuting persons who sell or barter, or donate or furnish in any manner whatsoever, liquors, wines, beer, or any intoxicating beverage whatsoever to Indians upon or belonging to any Indian reservation, $5,000, and no part of section 2139 or of section 2140 of the Revised Statutes shall be a bar to the prosecution of any officer, soldier, sutler, or storekeeper, attaché, or employé of the army of the United States, who shall barter, donate, or furnish in any manner whatsoever liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian.

From which it would seem that the beverages herein specifically enumerated were within the inhibition of sections 2139 and 2140, which are expressly referred to in said section.

But little need be added in the way of argument to the full and exhaustive review of the cases in which this and similar statutes have been construed by the State and Federal courts embodied in the opinions of the learned judge in the court below on the trial of this cause and on the trial of the *United States* v. *Ellis*, in the same court in July, 1892, reported in 51 Fed. Rep., 808. In this latter

case almost every view that can be suggested is presented with a fullness and clearness which leaves but little if anything to be added.

In many of the States of the Union attempts have been made to preclude all such questions as that presented here by definitions of the various kinds of liquors and beverages in the criminal statutes of such States. This is conspicuously the case in the States of Massachusetts and New Hampshire. But little aid is to be derived, therefore, from the adjudicated cases in such States in determining the exact legal status of any beverage not expressly embraced in the prescribed definitions.

In *Commonwealth* v. *Butner* (14 Gray, p. 83), the supreme judicial court of Massachusetts held in 1859 that under statute of 1855, chapter 215, section 17, evidence that lager beer was not intoxicating was admissible in defense of an indictment charging the sale of intoxicating liquors.

And in *State* v. *Adams* (56 New Hamp., 568), it was held that an indictment for selling spirituous liquors does not charge the defendants with selling ale, porter, or wine; while in *State* v. *Martin* (34 Ark., 340), it was held that:

> Alcohol is not an ardent or vinous spirit or liquor of any kind.

The author of the article on intoxicating liquor in 11 Eng. and Am. Enc. of L., p. 579, states as the result of a great mass of authorities cited by him in the notes that—

> It is now well settled that the word "beer" in its ordinary sense denotes a beverage which is intoxicating and is within the fair meaning of the words "strong or spirituous liquors" used in statutes regu-

lating the sale of such liquor. But where a statute prohibits the sale of intoxicating liquors only and not "beer" by name, there being some kinds of beer which are neither malt liquor nor intoxicating, to convict for sale of "beer" it must be shown that it is one of the liquors named in the statute. Beer will always be presumed to be an intoxicating liquor. (*Rau* v. *People*, 63 N. Y., 277; *State* v. *Teissedre*, 30 Kans., 476.) The court will take judicial notice of the fact that lager beer is a malt liquor and intoxicating.

Elsewhere it is said that whether lager beer is intoxicating is a question for the jury. (*People* v. *Zeigler*, 6 Park. C. R., 355; *State* v. *Gryette*, 11 R. I., 592; *Egan* v. *State*, 53 Ind., 162.)

It will be observed in looking at section 2139, that three forms of expression are employed in designating the thing prohibited. There is, first, the general inhibition, "No *ardent spirits* shall be introduced under any pretense into the Indian country." "Every person who sells, etc., *spirituous liquors or wine*. * * * But it shall be a sufficient defense to any charge of introducing, etc., *liquor* into the Indian country."

From which it would seem that Congress was not aiming so much at any technical accuracy, or etymologic nicety to form of expression, but was employing these three different terms in their popular sense to express the general intention that all beverages, by whatever name they might be called, or however produced, whether by distillation or extraction or fermentation, which would make a man drunk, and especially make an Indian drunk, should not be introduced into the Indian country.

It is in proof here, with nothing even tending to contradict it, that the lager beer which this defendant was charged with introducing into the Indian country was *intoxicating* in its effects, and it would be "sticking in the bark" to so construe this statute as that one man, who introduced whisky into the Territory from which the Indians were made drunk, should suffer the penalty prescribed for his wrongdoing, while his neighbor who introduced lager beer, from which just as many Indians were made just as drunk, should go scot-free, because, although alcohol existed in both beverages, yet in one it was in solution while in the other it was free.

Hollander v. *Magone* (149 U. S., 586) can have no application here.

It is important that the evil resulting from the sale of lager beer to the Indians should be speedily corrected, because of its disastrous results; and in no way can it be more effectually accomplished than by the determination by this court of the question presented in this appeal.

HOLMES CONRAD,
Assistant Attorney-General.

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